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March 26, 1993

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MAR 26 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 93-41

Dear Ms. Searcy:

Transmitted herewith, on behalf of Triad Family Network, Inc., applicant in the above-referenced proceeding, is an original and six (6) copies of its Opposition to Petition for Leave to Amend.

Should questions arise with respect to this filing, kindly communicate with the undersigned.

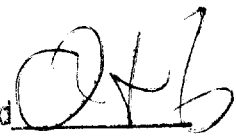
Very truly yours,



Lee J. Peltzman
Counsel for
TRIAD FAMILY NETWORK, INC.

LJP:bpt
Enclosure
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**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Application of

TRIAD FAMILY NETWORK, INC.
Winston-Salem, North Carolina
Channel 207C3

POSITIVE ALTERNATIVE RADIO, INC.
Asheboro, North Carolina
Channel 207A

For Construction Permit for a
New Noncommercial Educational
FM Station

To: The Honorable Joseph P. Gonzalez
Administrative Law Judge

MM Docket No. 93-41

BPED-910227MD

BPED-911119MC

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MAR 26 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

OPPOSITION TO PETITION FOR LEAVE TO AMEND

Triad Family Network, Inc. ("Triad"), by its attorneys, hereby opposes the Petition for Leave to Amend filed by Positive Alternative Radio, Inc. ("Radio") on March 17, 1993. In support of its position, Triad submits the following:

Radio has filed a Petition for Leave to Amend in which it specifies a new transmitter site. An earlier Petition for Leave to Amend, filed prior to the designation of Radio's application, was denied by the Commission, through the Chief, Audio Services Division, in the Hearing Designation Order

Radio has already petitioned for reconsideration of the HDO. (A copy of Radio's Petition for Reconsideration is attached to the instant Petition for Leave to Amend). Radio admits, as it must, in both of its petitions that the HDO expressly considered the question of good cause for acceptance of its earlier amendment. Despite this, Radio proffers that same amendment to the Presiding Officer, challenging the basis of the Commission's action without citing any changed circumstances since the Commission's initial ruling. Radio's rationale for filing its post-designation Petition for Leave to Amend is that the Commission staff may not reach a decision on its Petition for Reconsideration "before time expires for filing of this [Petition]".¹ Radio also suggests that it may be able to file a petition for leave to amend under Section 73.3522(b)(2) of the rules as a matter of right because it relates to an issue, which is not really an "Issue", raised in the HDO.²

Radio's petition is objectionable on numerous grounds and should be alternatively dismissed or denied. Initially, Radio apparently cannot come to terms with why it must amend. It blames unnamed parties for its problems, speculating that "someone, somewhere, ha[s] been marshalling forces against Radio." Radio even threatens to file a petition to enlarge against someone. Radio infers from the earlier filing of

¹Radio Petition for Leave to Amend at p. 1 n. 1.

²Radio Petition for Leave to Amend at p. 1. n. 2.

three separate Petitions to Deny against its application that someone has "gotten to" the owner of Radio's transmitter site.³ Radio's barely concealed effort to blame Triad or

law of the case....[T]he ALJ should not undo what was done in the HDO." Id. at para. 24. See also Empire State Broadcasting Corp., 67 RR 2d 1218, 1224 (Rev. Bd. 1990) ("where an HDO has fully considered and rejected a proposition, the Board is not at liberty to second guess or to act in any manner inconsistent with that HDO"); The Gene Sudduth Co., Inc., 56 RR 2d 1326, 1327 (Rev. Bd. 1984) ("while it is well established that a presiding officer has great latitude and discretion in regulating the course of hearing procedures, the Commission regards any attempt by either an ALJ or Review Board to challenge the basic validity of a hearing designation order as beyond its authority"; Merrimack Valley Broadcasting, Inc., 52 RR 2d 1210, 1221 (Rev. Bd. 1982) ("in the absence of new facts or circumstances, the Board is precluded from reviewing the Commission's determination"); Golden State Broadcasting Corp., 52 RR 2d 1253, 1254 (Rev. Bd. 1982) ("to the extent [petitioner] is merely requesting the Board to review the designation Order, we are bound by the Commission's prior action").

Here, the Commission expressly considered Radio's initial Petition for Leave to Amend. The Commission recited Radio's good cause showing and found it insufficient under the Erwin O'Conner test. Radio offers the same good cause explanation and supporting document in its present amendment as it submitted to the Commission previous to designation. In fact, Radio expends no effort to cite new facts or changed

circumstances since the release of the HDO rejecting its earlier amendment.⁵ Having considered and rejected Radio's petition and having cited a specific reason for its action, the HDO in this case may not be reviewed or reconsidered at hearing. Radio may not like the Commission's decision but it cannot legally challenge the accuracy of that decision at hearing. The parties are bound by the Commission's prior action.

Radio's reasoning that it must appeal to the Presiding Officer for relief through the filing of a Petition for Leave to Amend because a decision on Radio's Petition for Reconsideration may not be immediately forthcoming is frivolous. If that were the standard for considering at hearing rulings made in hearing designation orders, then the Atlantic Broadcasting series of cases would effectively be turned on their collective head. Neither is Radio's Petition for Leave to Amend acceptable under Section 73.3522(b)(2) of the rules. Radio offers this assertion as more of a "suggestion" than a legal argument. Yet, Radio admits that no issues have been designated against it in the HDO. Therefore,

⁵At note 7 of its Petition for Leave to Amend, Radio declares that one of its principals, Vernon H. Baker, held a recent conversation with Radio's site owner, Edward Swicegood, in which Baker was informed that the site owner had not had "a change of heart." The failure of the site owner to reconsider his previous decision is not a changed circumstance. Even Radio admits that "[s]ince the deadline for payment set by Swicegood has expired [which occurred prior to the filing of Radio's first Petition for Leave to Amend], Radio has [had] no site." Petition for Leave to Amend at p. 4.

the rule, by its own terms, cannot possibly apply. Moreover, the Commission and Court have held that Section 73.3522(b)(2) does not permit applicants to freely amend "as a matter of right" within 30 days of the issuance of a hearing designation order. See Cleveland Telecasters Corp. v. FCC, 732 F 2d 962, 965 n.2 (D.C. Cir. 1984); Radio Associates, Inc., 69 RR 2d 95 (Rev. Bd. 1991).

In sum, Radio's Petition for Leave to Amend is procedurally defective and should be dismissed. It asks the Presiding Officer to reconsider a ruling made in a hearing designation order based on Radio's allegation that the Commission erred in rejecting Radio's first Petition for Leave to Amend. That is impermissible under binding Commission precedent.

However, even considering Radio's good cause claim on its merits, that showing is legally insufficient and warrants outright denial of Radio's amendment. By Radio's own admission, it failed to "broach the subject of a reasonable charge to Radio" with Edward Swicegood, its site owner, for use of Radio's proposed site.⁶ Accordingly, if Radio did not know the cost of its site at the time it filed its application, it was only because it failed to inquire. Having failed to discuss the cost of its proposed site prior to filing its application or, for that matter, during the subsequent year, Radio could scarcely claim unfair surprise

⁶Radio Petition for Leave to Amend at p. 3.

when it eventually learned that Mr. Swicegood wanted more money than Radio could or would be willing to spend. Radio's proposed site was not unilaterally withdrawn. Contrary to its claim, Radio was not unfairly denied use of a site. Rather, Radio made a business judgement that it would not pay what was required for it to have its site.⁷ As such, as a direct result of its business judgement, Radio does not now have use of its proposed site. That is the direct and unavoidable consequence of Radio's voluntary decisions -- first, to remain ignorant of what it would cost it to lease Mr. Swicegood's site and second, not to reach an agreement.

Not only was Radio's site loss a result of its voluntary decision not to negotiate with Mr. Swicegood, it was abundantly foreseeable given that Radio was advised exactly what would occur if no understandings were reached. Additionally, Radio violated Section 1.65 of the rules by failing to advise the Commission for over 30 days of its site loss, a reportable event,⁸ at the very time that a hearing

⁷According to Radio, it concluded, based on a "friendly, cooperative conversation" with Mr. Swicegood, that Swicegood would require a "reasonable" fee for use of his tower and that Radio was subsequently shocked by Mr. Swicegood's proposed terms. Petition for Leave to Amend at p. 3. Radio's sole support for its allegation that Mr. Swicegood was unreasonable in his proposed terms is the opinion of Radio principal, Vernon Baker, hardly an unbiased analyst. Moreover, given the fact that Radio by its own statement never, at any time, broached the subject with Mr. Swicegood, it has no basis now for criticizing Mr. Swicegood's opinion of what it should cost to lease his land.

⁸See 62 Broadcasting, Inc. 65 RR 2d 1928, 1833 n.3 (Rev. Bd. 1989).

designation order was being prepared. Further, the hearing processes have already been disrupted by the need for the Presiding Officer, the Bureau and Triad to have to consider Radio's meritless petition and review Radio's incorrect engineering once more. See below.

In fact, it is questionable whether there ever was a meeting of the minds of the involved parties. See Progressive Communications, Inc., 3 FCC Rcd. 5758, 5759-60 (Rev. Bd. 1988). Important details of any purported lease, such as the cost and duration, were not discussed, and, now, will never be agreed upon. Thus, it is abundantly clear that Radio has never had reasonable assurance of site availability for its transmitter. Robert D. Janecek d/b/a Lion's Share Broadcasting, FCC 93D-5 (Admin. L.J., released February 12, 1993). Since Radio did not have reasonable assurance at the time that it filed its application, and its failure to obtain such assurance came as a result of its failure to reach an understanding as to essential lease terms, it had no right to file a curative amendment. See 62 Broadcasting, Inc., supra, 65 RR 2d at 1835 n. 4.

Moreover, Radio's amendment is unacceptable on technical grounds as well. As the Engineering Statement of York David Anthony describes, Radio's⁹ site has been plotted incorrectly on its site map. Because its site coordinates are incorrect,

⁹Radio is identified by shorthand as "Positive" in Mr. Anthony's Engineering Statement.


all of the calculations in its amendment derived from that data, including site elevation and height above average terrain, are also wrong. Radio's amendment also fails to include information required by Sections 73.316(c) and 73.316(g) of the Commission's rules. Given these technical flaws, Radio's amendment cannot be processed and merits rejection on this ground as well.

In view of the above, Radio's post-designation Petition for Leave to Amend must be dismissed or denied.

Respectfully submitted,

TRIAD FAMILY NETWORK, INC.

By: _____


B. Jay Baraff
Lee J. Peltzman
Its Attorneys

**BARAFF, KOERNER, OLENDER
& HOCHBERG, P.C.
5335 Wisconsin Ave., N.W.
Washington, D.C. 20015**

March 26, 1993

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ENGINEERING STATEMENT
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At the request, and on behalf of TRIAD FAMILY NETWORK, INC ("Triad") I have been asked to present an engineering statement supporting the attached Opposition to Petition to Leave to Amend. My qualifications as an electrical engineer are a matter of record with the Commission. In support whereof I present the following:

1. Positive Alternative Radio ("Positive") is the applicant for a NEW NCE-FM station at Asheboro, NC. (BPED-911119MC). Positive's application is mutually exclusive with Triad's application for a NEW NCE-FM station at Winston-Salem, NC (BPED-910227MD). On February 9, 1993, Positive filed an engineering amendment to specify a new transmitter site. Positive's new proposed site is the #2 tower of standard broadcast station WZOO Asheboro, NC. Pertinent technical information for WZOO appears as Exhibit 1.

2. The following basic and derived information is supplied by Positive in FCC Form 340, section V-B. This data is critical for the foregoing analysis.

TABLE 1
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Parameter (Form 340 #)	Positive's Amendment	WZOO FCC Data
Site Coordinates [2(a)]	35-45-50 N, 79-50-04 W	35-45-50 N, 79-50-04 W
Site Elevation [7(a)(1)]	195 meters	213 meters
Tower Height [7(a)(2)]	106 meters	106 meters
Total Height [7(a)(3)]	301 meters	319 meters
FM height AGL [7(b)(1)]	99 meters	(no present FM)
FM height MSL [7(b)(2)]	204 meters	"

4. The "Proposed Site" mark of Positive was transferred to a new Randleman, North Carolina USGS 7.5 minute map (which is provided in the original of this engineering statement.) This map (Exhibit 3) is identical to Positive's Figure 1. A new map ensures accurate determination of site location and elevation. Common office copiers (as used in Positive's amendment) introduce distortion that can affect radiometric coordinate calculations. However, these errors are negligible for site location relative to nearby features.

5. On analysis, Positive's site mark on its site map reveals site coordinates of 35-45-50 N and 79-50-01 W. This does not square against WZOO's FCC coordinates of 35-45-50 N and 79-50-04 W. Positive's error is approximately 75 meters (245 feet) due east. Positive's 3 arc-second error is considerably greater than the Commission's permitted tolerance of 1 arc-second plus or minus.

6. On February 22, 1993, this office travelled to Asheboro, North Carolina to examine the WZOO site. Observations were confined to SR 3137 (Lazy Pine Road). The purpose was to determine if WZOO's #2 tower was in fact located at 35-45-50 N and 79-45-04 W. A Trimble TransPak GPS (global positioning system), and triangulation from known landmarks revealed that WZOO's #2 tower location is correctly specified. The Randolph County, NC Tax Assessor's map #7753, and various land deeds were searched to obtain fixed landmarks of legal quality. Map #7753 is presented as Exhibit 4.

7. Analysis of our raw data indeed show that WZOO's site coordinates for tower #2 are correct. Moreover, the raw data show that WZOO's site elevation is also correct.

8. Positive states in its engineering exhibit it claims the published elevation for WZOO is 700 feet AMSL (or 213 meters). It claims that the actual elevation for WZOO is 638 feet AMSL (or 194 meters). Its figures are not correct. When WZOO's #2 tower is plotted correctly the site elevation is 650 feet (or 198 meters).

9. Both Positive's site coordinates and elevation data are incorrect. Therefore, Positive's derived data (including HAAT) contained on section V-B page 2 of its amendment is incorrect.

10. Positive's amendment has further engineering difficulties. Whenever an FM directional antenna (FM-DA) is specified by an applicant, rule 73.316(c) is invoked. The 73.316 data offered by Positive is inadequate. A stock Cetec FM-DA is specified by Positive. No description of the antenna (other than a model number) is presented; therefore, the "full description" of the antenna design required in 73.316(c)(1) is not met. Furthermore, the required showing pursuant to 73.316(c)(4) through 73.316(c)(7) has simply been omitted.

11. Also, rule 73.316(g) is not substantially addressed by Positive. Positive specifies an isocoupler will be provided to avoid shorting the WZOO #2 tower to ground. Also, Positive agrees to make certain measurements before and after construction. Positive, however, does not state other data required establishing the FM proposal's feasibility.

12. For example, on Form 340, Positive's FM antenna radiation center is reckoned to be 99 meters AGL. The specified antenna is at least 10.1 meters long. WZOO's top guy rope anchors are 97.5 meters AGL. A 10.1 meter long antenna centered at 99 meters AGL is close to the anchors at 97.5 meters AGL. One FM antenna bay is coincident with the clevis and pin arrangement anchoring WZOO's guy ropes. Conductive steel rope passing into the FM antenna active volume requires detailed engineering study for electrical and mechanical reasons.

13. Also, installation of an FM antenna on WZOO's #2 tower may sufficiently alter WZOO's antenna system so that a complete proof of performance on the AM antenna is required. For example, constructing a building to house Positive's transmitter (or plowing up the AM ground system to install

the FM transmission line) may greatly disturb WZOO's facility. Moreover, when a station is "grandfathered" under the old sampling system rules the FCC has often required a new Proof and installation of an approved sampling system under rule 73.68.

14. Positive has not adequately assessed the technical effects or expense of its proposal as regards WZOO's AM directional. This includes

overall performance (e.g. allocation effects), effects of FM environment

EXHIBIT 1
TRIAD FAMILY NETWORK, INC.
NEW FM, WINSTON-SALEM, NC

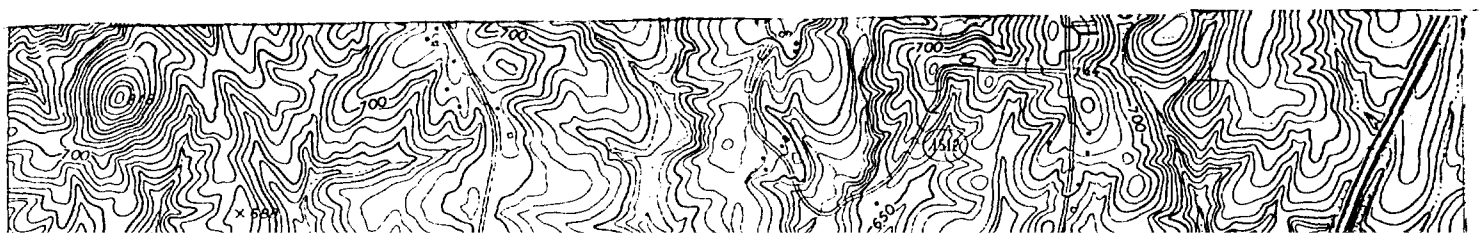
FCC DATABASE RECORD
WZOO ASHEBORO, NC

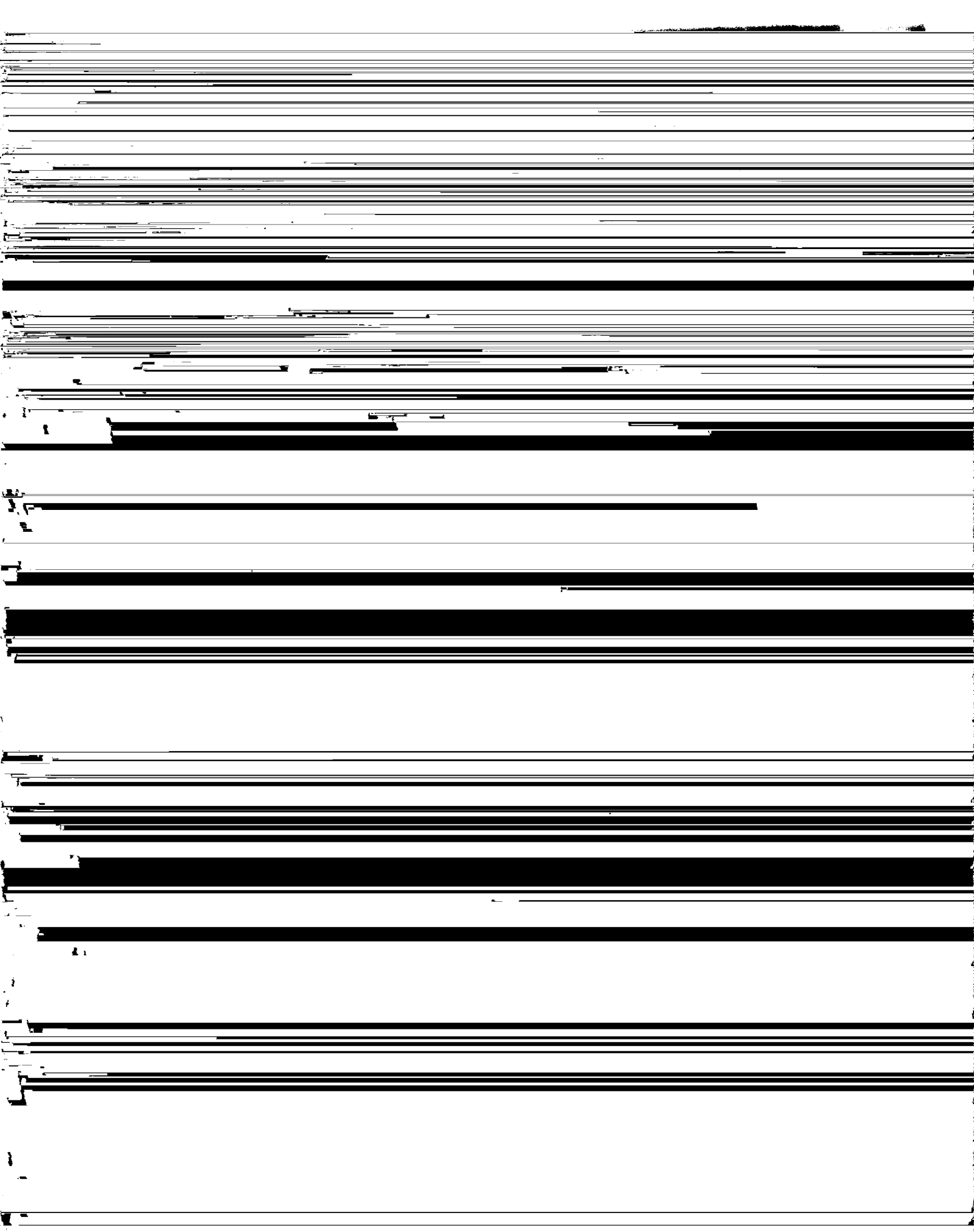
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Licensee name								kW	mV/m	Longitude

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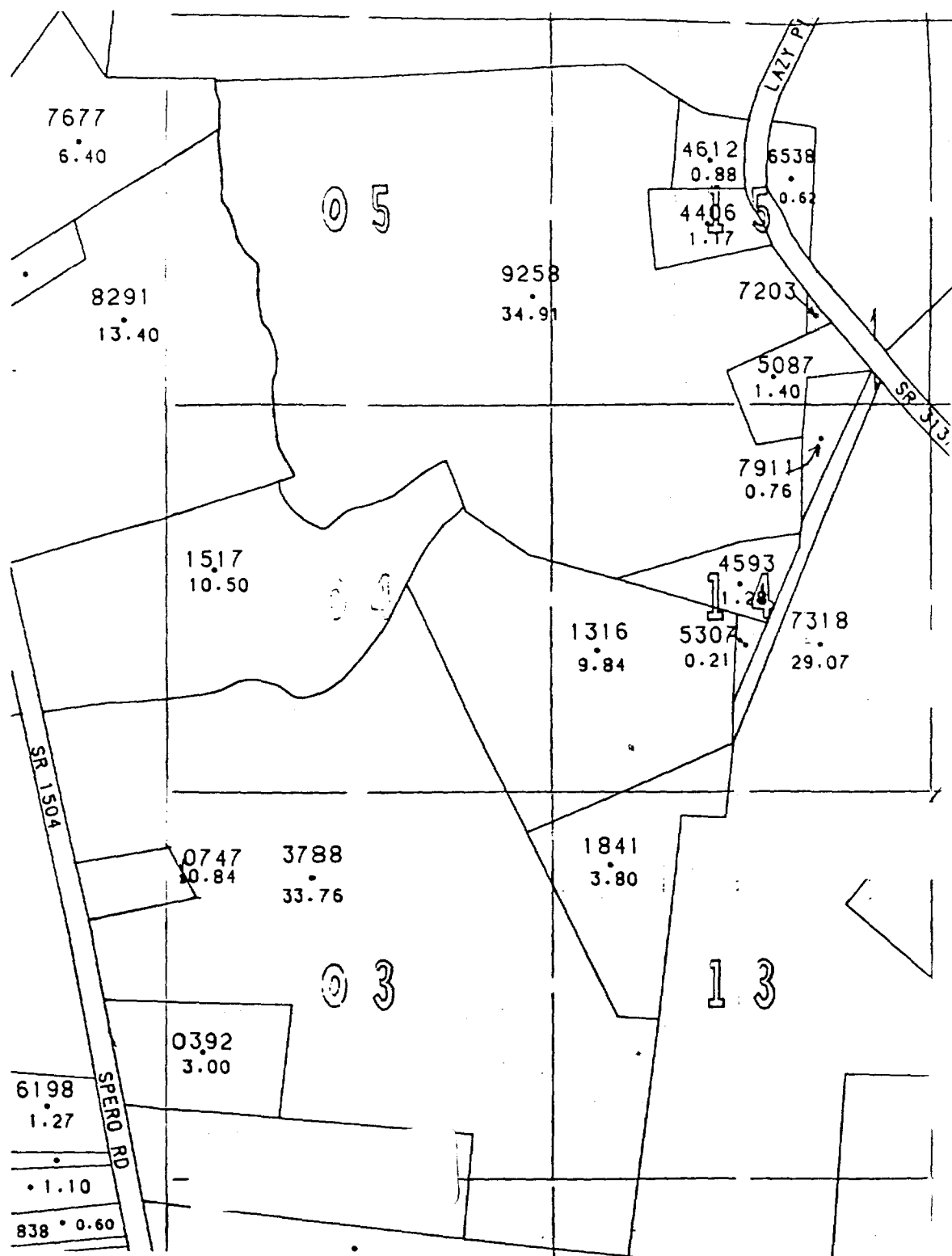
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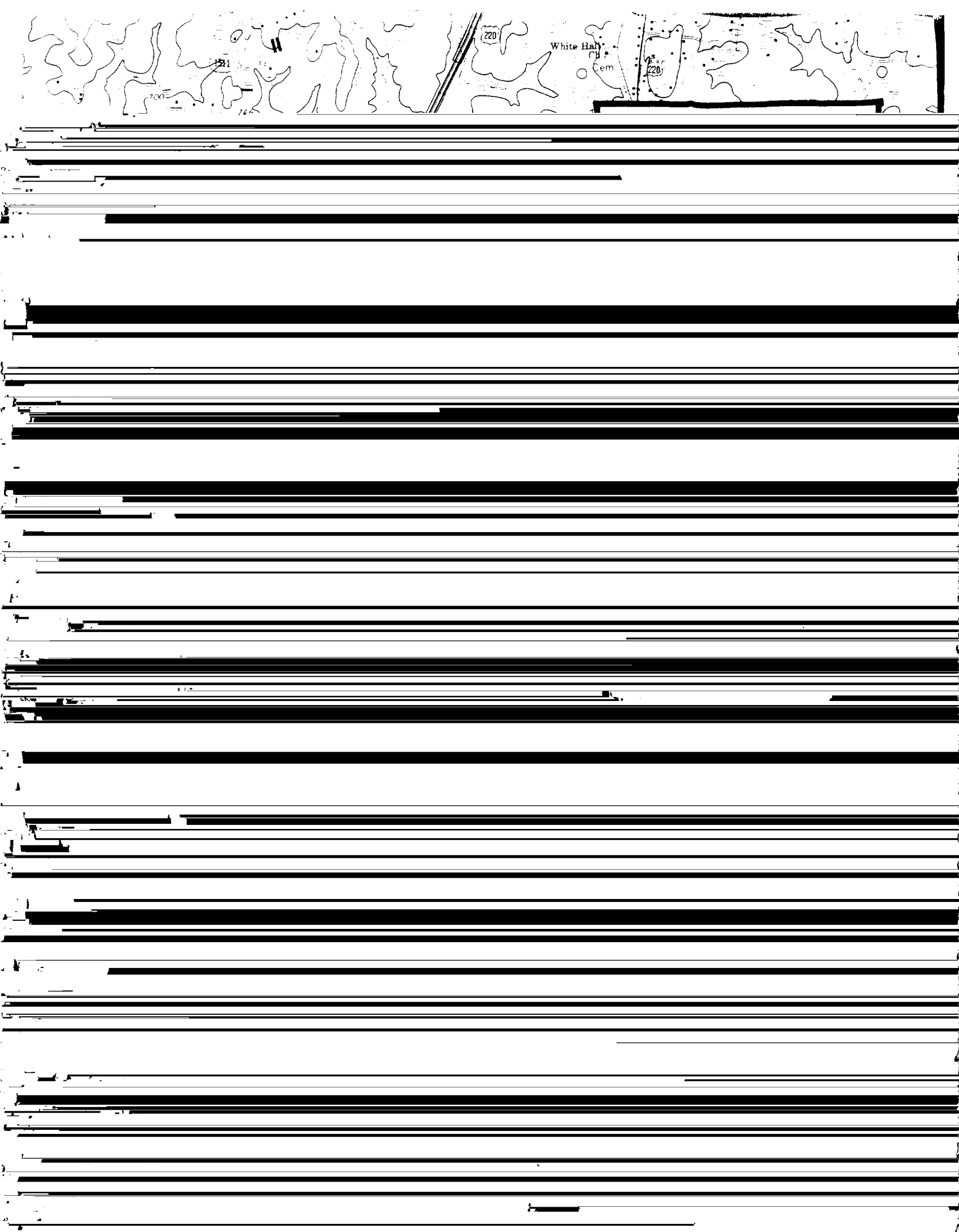
3961





MAP 7753 06/26/92





CERTIFICATE OF SERVICE

I, Barbara P. Taylor, a secretary in the law offices of Baraff, Koerner, Olender & Hochberg, P.C., do hereby certify that a true and correct copy of the foregoing "Opposition to Petition for Leave to Amend" on behalf of Triad Family Network, Inc., has been sent by prepaid United States mail, first class, on this 26th day of March, 1993 to the following:

The Honorable Joseph P. Gonzalez*
Administrative Law Judge
Federal Communications Commission
2000L Street, N.W., Room 221
Washington, D.C. 20554

Chief, Audio Services Division
Federal Communications Commission
1919 M Street, N.W., Room
Washington, D.C. 20554

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*Via Hand Delivery